

③
No. 90-726

Supreme Court, U.S.
F I L E D

DEC 7 1990

JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

MITCHELL'S FORMAL WEAR, INC.,
Petitioner,
v.

KENTUCKY OAKS MALL COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF OHIO

BRIEF OF
NATIONAL RETAIL FEDERATION,
AS *AMICUS CURIAE*, IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI

Michael J. Altier
National Retail Federation
701 Pennsylvania Ave., N.W.
Suite 710
Washington, DC 20004
(202) 783-7971

Counsel for *Amicus Curiae*

December 7, 1990



QUESTION PRESENTED

Did the Supreme Court of Ohio violate the Petitioner's fourteenth amendment right to due process of law by holding that Petitioner was subject to personal jurisdiction of the Ohio courts under the Ohio long-arm statute when Petitioner entered into a single contract with the Respondent, an Ohio resident, for the lease of certain property in Kentucky in which the Petitioner operates a retail business and when that single contract was negotiated over the phone and the Petitioner never set foot in Ohio?

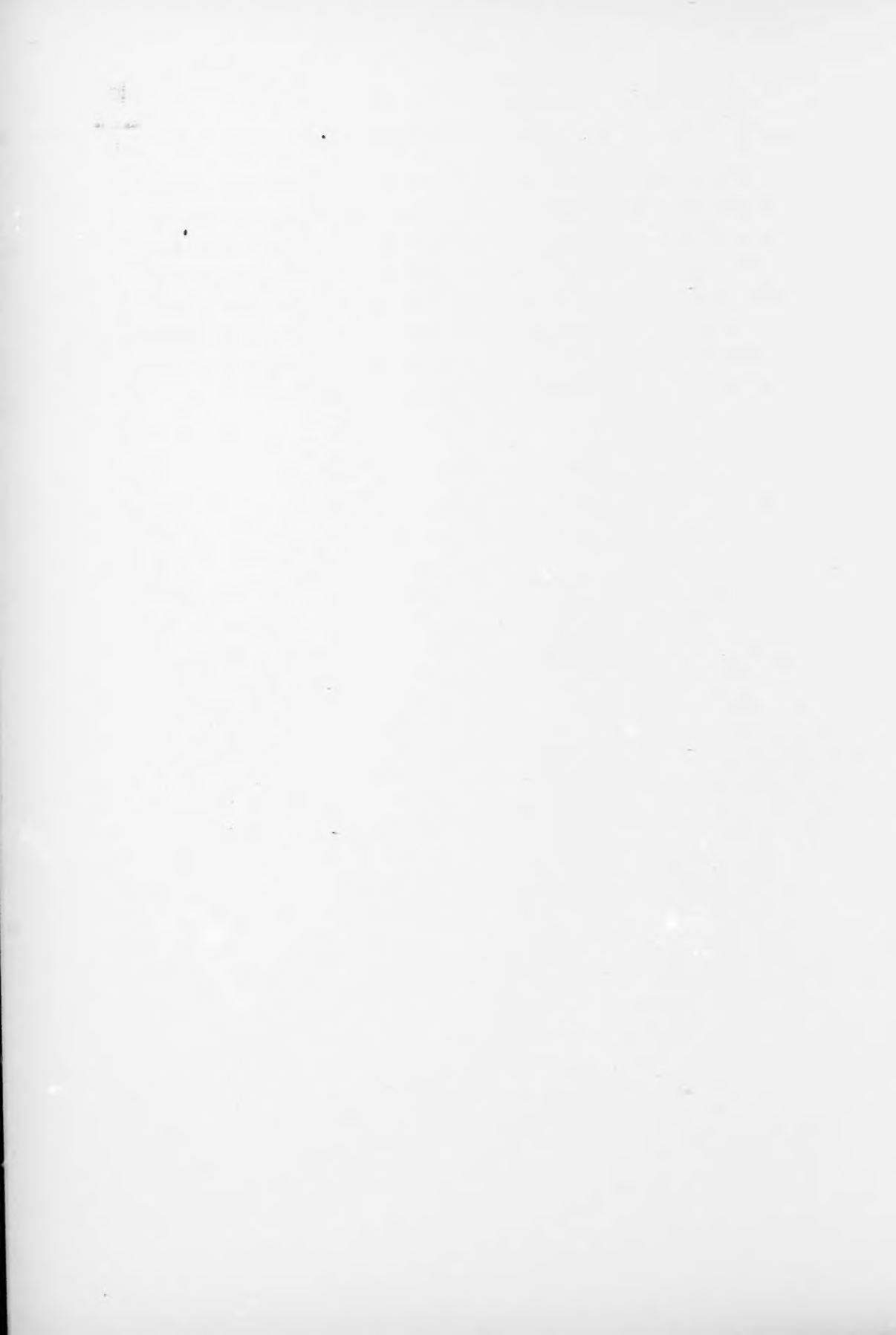


TABLE OF CONTENTS

	<u>Page</u>
QUESTION PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
INTEREST OF THE <i>AMICUS CURIAE</i>	3
SUMMARY OF THE ARGUMENT	5
ARGUMENT	5
I. This Court has never addressed the issue involved in this case; that is, whether a state can exercise long-arm jurisdiction over a non- resident defendant based solely on a single lease agreement with a resident of the forum state when the nonresident defendant had no other contacts with the plaintiff or the forum state.....	5
II. The exercise of personal jurisdiction over a nonresident defendant based on a single contact with a resident of the forum state violates that defendant's fourteenth amendment right to due process of law.	9
A. The Petitioner has not purposely established minimum contacts with the forum state suffi- cient to expect to be haled into court there.....	10
1. A Georgia company does not transact business in Ohio within the meaning of the Ohio long-arm statute when the Georgia company enters into a contract with an Ohio resident to lease a space for retail sales in a Kentucky mall.	13

2. To support its decision that "a lease agreement . . . is 'transacting business' within the forum state's long-arm statute," the Ohio Supreme Court relied on cases which involved a far greater amount of activity by the defendant with the forum state than the single contact that occurred in the present case.	14
B. When all of the relevant interests of the parties and states involved in this case are balanced, the Ohio Supreme Court's holding that the Petitioner is subject to personal jurisdiction of the Ohio courts violates traditional notions of fair play and substantial justice.	17
CONCLUSION	19

TABLE OF AUTHORITIES

Cases:	Page
<i>Aaron Ferer & Sons Co. v. American Compressed Steel Co.</i> , 564 F.2d 1206 (8th Cir. 1977)	7
<i>Arthur, Ross & Peters v. Housing, Inc.</i> , 508 F.2d 562 (5th Cir. 1975)	11
<i>Burger King Corp. v. Rudzewicz</i> , 471 U.S. 462 (1985)	6, 10, 13, 17, 18, 19
<i>Colonial Leasing Company of New England, Inc. v. Pugh Brothers Garage</i> , 735 F.2d 380 (9th Cir. 1984)	10, 11
<i>Galgay v. Bulletin Company, Inc.</i> , 504 F.2d 1062 (2d Cir. 1974)	12
<i>Hanson v. Denckla</i> , 357 U.S. 235 (1958)	8
<i>International Shoe Co. v. Washington</i> , 326 U.S. 310 (1945)	6, 7, 9, 13
<i>Iowa Elec. Light & Power Co. v. Atlas Corp.</i> , 603 F.2d 1301 (8th Cir. 1979)	11
<i>Keeton v. Hustler Magazine, Inc.</i> , 465 U.S. 770 (1984)	8
<i>Kentucky Oaks Mall Co. v. Mitchell's Formal Wear, Inc.</i> , 53 Ohio St. 3d 73 (1990)	13, 14, 17, 18
<i>Klippel v. Heintz</i> , 231 Kan. 312, 644 P.2d 428 (1982)	15
<i>Lakeside Bridge & Steel Co. v. Mountain State Construction Co., Inc.</i> , 445 U.S. 907 (1980)	6

<i>Misco Leasing, Inc. v. Vaughn</i> , 450 F.2d 257 (10th Cir. 1971)	12
<i>S.D. Leasing, Inc. v. Al Spain and Associates</i> , 277 Ark. 178, 640 S.W.2d 451 (1982)	16
<i>Schano Transp., Inc. v. Smith</i> , 312 N.W.2d 114 (Minn. 1981)	15, 16
<i>Vena v. Western General Agency, Inc.</i> , 543 F.Supp. 779 (N.D. Ill. 1982)	15
<i>World-Wide Volkswagen Corp. v. Woodson</i> , 440 U.S. 286 (1980)	5, 17
<i>Wright Int'l Express, Inc. v. Roger Dean Chevrolet, Inc.</i> , 689 F. Supp. 788 (S.D. Ohio 1988)	14, 18

Statutes:

Ohio Rev. Code Ann. § 2307.382 (Anderson Supp. 1989)	13, 14
---	--------

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

No. 90-726

MITCHELL'S FORMAL WEAR, INC.,
Petitioner,

v.

KENTUCKY OAKS MALL COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF OHIO

**BRIEF OF
NATIONAL RETAIL FEDERATION,
AS *AMICUS CURIAE*, IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI**

This brief is respectfully submitted on behalf of the National Retail Federation (NRF), as *amicus curiae*. Pursuant to Rule 37.2 of the rules of this Court, NRF has obtained and filed the written consent of each of the parties to the filing of this brief. NRF supports the position of the Petitioner in this case, requests that the petition be granted and urges that the decision below be reversed.

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. Amend. XIV.

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner is a Georgia corporation which operates retail stores throughout the southeastern United States. Petitioner does not operate any stores outside of the southeast region of the United States. Petitioner has never operated a retail store in the state of Ohio.

Respondent is an Ohio limited partnership which owns and operates a mall in the state of Kentucky. The respondent is controlled by the Cafaro Company, which is based in Ohio and which is one of the largest developers of shopping malls in the United States.

In 1985 the petitioner entered into an agreement with the respondent whereby the petitioner would lease a shop in the Kentucky Oaks Mall from the respondent for the purpose of operating one of petitioner's retail stores. The Kentucky Oaks mall is located in Paducah, Kentucky. Petitioner has no agents, employees, offices or stores in Ohio. In negotiating the lease agreement, the petitioner never went to Ohio. The lease provides that Kentucky law governs any conflicts which arise between the petitioner and respondent. The petitioner's only contacts with Ohio were telephone conversations with the respondent, sending a signed copy of the lease agreement from Georgia to the respondent in Ohio, and mailing rent checks to the respondent in Ohio.

In January of 1988, the respondent sued the petitioner in the Court of Common Pleas of Mahoning County, Ohio, alleging that the petitioner had breached the lease agreement. Petitioner moved to dismiss the complaint on the grounds that the Ohio courts did not have personal jurisdiction over the petitioner. On September 20, 1988, the Court of Common Pleas granted the petitioner's motion and dismissed the respondent's complaint.

On September 26, 1988, the petitioner filed suit against the respondent in Kentucky, where Kentucky Oaks Mall is located. That case involves the same issues as those set out by the respondent in the present case. The Kentucky case is pending.

Respondent appealed the Ohio trial court's dismissal to the Ohio Court of Appeals for the Seventh District, Mahoning County, Ohio. The Court of Appeals affirmed the dismissal.

On July 28, 1989, respondent appealed to the Supreme Court of Ohio. On August 8, 1990, the Supreme Court of Ohio reversed the decision of the Court of Appeals and remanded the case for further proceedings. The Supreme Court of Ohio held (1) that the petitioner was transacting business in Ohio by virtue of having entered into the lease agreement with a resident of Ohio and by sending rent checks to the respondent in Ohio, and (2) that the petitioner was, therefore, subject to personal jurisdiction under the Ohio long-arm statute and that its due process rights would not be violated by being forced to defend itself in the courts of Ohio.

The petitioner filed a Petition for a Writ of Certiorari in this Court on November 5, 1990.

INTEREST OF *AMICUS CURIAE*

National Retail Federation (NRF) is the largest national trade association representing the retail industry. Created by a recent merger between the American Retail Federation and the National Retail Merchants Association, the new organization represents fifty state retail associations and twenty seven national retail associa-

tions. In total, NRF represents over one million retail establishments in the United States, which employ nearly sixteen million people.

As a representative of such a large number of retail establishments, NRF is naturally interested in any litigation involving a retail business. NRF is particularly interested in the present case because of the broad effect the decision of the Ohio Supreme Court will have on retailers if allowed to stand. The vast majority of retail businesses in the United States lease the buildings in which they operate their stores. Therefore, NRF members are involved in thousands of lease agreements every year similar to the one in the present case. Due to capital limitations, combined marketing efforts and numerous other reasons, retailers are forced to rely on large property developers like the Cafaro Company to build the malls and shopping plazas where the retailers locate their stores.

Typically, retailers operate businesses in only one state or region of the country. Therefore, they are primarily interested in finding a good location to conduct their business within that state or region.

Many of NRF's members are individuals who have invested their life savings in a family business. A lot of these individuals locate their businesses in shopping centers in their hometown. They cannot afford to travel from these hometowns all across the United States to the East Coast where most insurance companies (the largest owners of shopping centers) are located. If the decision of the Ohio Supreme Court is allowed to stand, these individual retailers could be subject to personal jurisdiction of the courts of any state in which their landlords happen to have their offices. This will be true even though these retailers have purposely avoided doing business in that state and even though by contract (the lease), the retailer and the landlord may have agreed that the governing law will be the law of the state where the leased space is located.

SUMMARY OF THE ARGUMENT

This Court has never squarely addressed the issue present in this case, that is: Whether a state can exercise long-arm jurisdiction over a non-resident lessee based on a single lease contract with a resident lessor when the lessee has no other ties with the lessor or the forum state. This Court's prior opinions on the issue of long-arm jurisdiction suggest that the petitioner's due process rights under the fourteenth amendment are violated if the petitioner is subject to Ohio personal jurisdiction on a single contact.

The petitioner has intentionally not established minimum contacts with Ohio sufficient to expect being haled into court there. The petitioner had only a single contact with a resident of Ohio and, prior to this lawsuit, had never set foot in Ohio. Balancing the particular facts of this case with the interests of the parties and the states involved, to subject the petitioner to long-arm jurisdiction in the Ohio courts would not comport with traditional notions of fair play and substantial justice.

ARGUMENT

- I. **This Court has never addressed the issue involved in this case; that is, whether a state can exercise long-arm jurisdiction over a non-resident defendant based solely on a single lease agreement with a resident of the forum state when the nonresident defendant had no other contacts with the plaintiff or the forum state.**

One of the major goals of the due process clause will be severely undermined if the decision of the Ohio Supreme Court is allowed to stand. In *World-Wide Volkswagen Corp. v. Woodson*, this Court stated that "[t]he Due Process Clause, by ensuring the 'orderly administration of the laws,' gives a degree of predictability to the legal system that allows potential defendants to structure the primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." 440 U.S. 286, 297 (1980)

(citation omitted) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)).

The petitioner in the present case has attempted to structure its conduct in such a way that it would be able to defend and prosecute in the courts of Kentucky. It chose to operate a retail business in Kentucky. It picked out what it thought was the best location in Paducah, Kentucky to run its business. It entered into a lease agreement which is governed by the laws of Kentucky. It could not help the fact that its landlord had decided to set up its offices in Ohio. Yet despite all this effort by the petitioner to avoid being sued in Ohio, and despite the fact that petitioner had no contacts with Ohio other than the one lease agreement, the Ohio Supreme Court decided that the Ohio courts had jurisdiction over the petitioner. Because one goal of the due process clause is to allow individuals to be able to predict with some assurance where they are subject to being sued, the decision of the Ohio Supreme Court must be reversed.

Dissenting from the denial of certiorari in *Lakeside Bridge & Steel Co. v. Mountain State Construction Co., Inc.*, Justice White voiced the following concern:

[T]he question of personal jurisdiction over a nonresident corporate defendant based on contractual dealings with a resident plaintiff has deeply divided the federal and state courts. . . . [The disarray among the courts] may well have a disruptive effect on the commercial relations in which certainty of result is a prime objective. That disarray also strongly suggests that prior decisions of this Court offer no clear guidance on the question.

445 U.S. 907, 909-911 (1980). Since then, this Court has decided the case of *Burger King Corp. v. Rudzewics*, 471 U.S. 462 (1985), which only partially answered whether personal jurisdiction over a nonresident corporate defendant can be had based on contractual dealings with a resident plaintiff. In *Burger King*, the defendant, a Michigan resident, was a franchisee operating a restaurant in Michigan under a franchise agreement with the plaintiff, Burger King Corporation, a Florida resident. Burger King sued its franchisee

in Florida for breach of the franchise agreement. This Court held that Florida courts could properly exercise personal jurisdiction over the franchisee. However, *Burger King* is distinguishable from the present case on several very important grounds.

First, the opinion in *Burger King* states that "[t]he Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a *forum* with which he has established no meaningful 'contacts, ties, or relations.' " 471 U.S. at 471-2 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)) (emphasis added). The United States Court of Appeals for the Eighth Circuit addressed this point when it stated that "[t]o assess compliance with due process, with respect to jurisdiction in a particular case, the minimum contacts relied upon must be *between the defendant and the forum state, not simply between the defendant and a resident of the forum state.*" *Aaron Ferer & Sons Co. v. American Compressed Steel Co.*, 564 F.2d 1206, 1211 (8th Cir. 1977) (emphasis added). In *Burger King*, the franchisee had invoked the privileges and benefits of Florida law by entering into a franchise agreement which provided that it was to be governed by the laws of Florida. 471 U.S. at 481. In the present case, the lease provides that the laws of Kentucky govern any conflicts between the petitioner and respondent.

Second, in *Burger King*, the defendant and the plaintiff entered a "franchise relationship" in Florida. 471 U.S. at 466. Paragraph 37 of the lease agreement in the present case explicitly states that the only relationship between the petitioner and the respondent is that of landlord and tenant. See, Petition for Writ of Certiorari, p. 70a. This distinction is important because it evidences the vast difference in the relationship of the parties in the two cases.

Third, the franchisee in *Burger King* had a very substantial relationship with the Florida plaintiff. The franchisee derived a great business benefit from its relationship with the plaintiff. The franchisee's store displayed the Burger King name and logo. All of the food offered was Burger King food. The franchisee's packaging bore

the Burger King name and logo. The franchisee's business was dependent on its affiliation with Burger King. 471 U.S. at 464-5.

In the present case, there is no such dependency relationship. The petitioner could have entered a lease agreement with any other landlord and still operated the same business, but at a different location. The petitioner uses its own business name, not that of the respondent. In fact, most shoppers at Kentucky Oaks Mall have no idea (nor care) who owns the mall. The petitioner's business is due to its own good name and the names of other mall tenants acting as a draw to mall patrons.

Fourth, in *Burger King*, this Court stated that where a state seeks personal jurisdiction over a nonresident defendant,

it is essential . . . that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State. . . . This 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contracts. . . .

471 U.S. at 475 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) and *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984)) (emphasis added).

Petitioner had no more than a *random, fortuitous* or *attenuated* contact with the state of Ohio. The only reason the petitioner had any contact with Ohio was that the respondent happened to have its office in Ohio. The petitioner did not conduct activities in Ohio; its activities were limited to Kentucky or Georgia.

Fifth, in *Burger King*, this Court stated that "[i]f the question is whether an individual's contract with an out-of-state party *alone* can automatically establish sufficient minimum contacts in the other party's forum, *we believe the answer clearly is that it cannot.*" 471 U.S. at 478 (emphasis partially added). If the only contact involved is one contract, the Court must consider the terms of that contract along with prior negotiations between the parties and the contemplated future consequences. *Id.* at 479.

In *Burger King*, the prior negotiations as well as the contemplated future consequences of the contract involved a much closer relationship between the parties than was involved here. The negotiations between the parties in *Burger King* lasted four months after which they entered a "franchise relationship." 471 U.S. at 466. The future consequences contemplated by the franchise agreement involved regulation and oversight of the franchisee's restaurant by the franchisor. *Id.* 464-5.

In the present case, the negotiations concerned a store lease in Kentucky and future consequences concerned payment of rent and occupancy of space. There was no regulation and oversight or product name usage as was the case in *Burger King*. The petitioner's only contact envisioned by the lease was prompt payment of rent and other occupancy charges.

Because *Burger King* does not answer the question whether one contract between a nonresident lessee and a resident lessor is sufficient to subject the nonresident lessee to the personal jurisdiction of the lessor's state, and because of the heavy impact this case will have on retail merchants as commercial lessees, this Court should review and reverse the decision of the Ohio Supreme Court.

II. The exercise of personal jurisdiction over a non-resident defendant based on a single contact with a resident of the forum state violates that defendant's fourteenth amendment right to due process of law.

This Court has established a two-part test to determine whether the exercise of personal jurisdiction over a nonresident defendant violates the due process clause of the fourteenth amendment. In *Burger King Corp. v. Rudzewicz*, this Court stated that "[o]nce it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'" 471 U.S. 462, 476 (1985) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945)).

A. The Petitioner has not purposefully established minimum contacts with the forum state sufficient to expect to be haled into court there.

Under the first part of the two-part test set out in *Burger King*, a defendant must have sufficient minimum contacts with the forum state that the defendant "should reasonably anticipate being haled into court there." 471 U.S. at 474. Retail merchants, such as the petitioner in the present case, do not anticipate being haled into court in Ohio when they enter into an agreement to lease a shop in Kentucky, when the laws of Kentucky govern the contract, and when the retailers have no stores and conduct no business in Ohio and have never even been to Ohio. The mere fact that the landlord has its office in Ohio and the tenant, as required by the lease, sends rent checks to Ohio does not give rise to an anticipation by the tenant that it will be forced to go to Ohio to be sued in a dispute about the lease of the Kentucky store.

The Ohio Supreme Court relied heavily on this Court's holding in *Burger King*, *supra*, to hold that the petitioner had purposefully established minimum contacts sufficient to withstand due process scrutiny. As discussed above, the facts of that case are substantially distinct from the present case.

Several United States Circuit Courts of Appeal have held that no personal jurisdiction exists over a nonresident defendant when the only contact the defendant had with the forum state was one contract.

In *Colonial Leasing Co. of New England, Inc. v. Pugh Brothers Garage*, 735 F.2d 380 (9th Cir. 1984), the defendants owned an automobile repair shop in Georgia. The plaintiff, an Oregon corporation, leased a pipe bending machine to the defendants. The machine was delivered to the defendants from a third party in New York whom the defendants had initially contacted to inquire about leasing the machine. The plaintiff mailed the lease contract to the defendants who signed it and mailed it back to the plaintiff in Oregon. The defendants also mailed several rent checks to the plaintiff in Oregon. When the defendants breached the lease agreement, the plaintiff sued the defendants in Oregon. The Ninth Circuit Court

of Appeals, with Justice Kennedy, then a circuit court judge, sitting, affirmed the District Court's dismissal of the case for lack of personal jurisdiction. The court noted that "[t]he contacts with Oregon were no more than that each of the defendants in his home state signed a contract with a corporation doing business in Oregon and sent some monthly payments to that corporation in Oregon." *Id.* at 383. The court held that "on these facts [plaintiff's] assertion of jurisdiction over the defendants cannot be supported." *Id.*

The significant facts of *Colonial Leasing* are strikingly similar to the facts of the present case. Each case involves a defendant executing a contract with and mailing rent payments to a plaintiff in a different state. The amount and type of contacts each defendant had with the forum state are exactly the same. Therefore, the holding of *Colonial Leasing* persuasively suggests that the exercise of personal jurisdiction by the Ohio courts in the present case violates the petitioner's fourteenth amendment right to due process of law.

The decision of the Ohio Supreme Court contradicts *Colonial Leasing*. This Court should clear up this disparity by reversing the decision of the Ohio Supreme Court in light of *Colonial Leasing* and other cases reviewed herein.

In *Iowa Elec. Light & Power Co. v. Atlas Corp.*, 603 F.2d 1301 (8th Cir. 1979), the plaintiff, an Iowa company, sued the defendant, a Delaware corporation with its principal place of business in New Jersey. The plaintiff alleged the defendant breached a contract whereby it was to sell uranium ore to the plaintiff for a period of years. The defendant had no agents, employees, or offices in Iowa. Under the contract, the defendant was to deliver the ore to the plaintiff in Illinois. The court held that the plaintiff could not obtain personal jurisdiction over the defendant in Iowa because the defendant did not have the requisite minimum contacts with Iowa. In arriving at this holding, the court stated that "[m]erely entering into a contract with a forum resident does not provide the requisite contacts between a defendant and the forum state." *Id.* at 1303 (emphasis added).

In *Arthur, Ross & Peters v. Housing, Inc.*, 508 F.2d 562 (5th Cir. 1975), a North Carolina defendant entered into one contract

with the Texas plaintiff, under which contract the defendant was to purchase and develop land in North Carolina, a limited partnership with the plaintiff and then transfer title to the land to the limited partnership. The court held that the defendant did not have the required minimum contacts with the forum state.

In *Galgay v. Bulletin Company, Inc.*, 504 F.2d 1062 (2d Cir. 1974), the plaintiff, a trustee in reorganization for Hoe, a New York machinery manufacturer, sued the defendant, a Pennsylvania corporation, in the New York federal courts for breach of contract. Hoe and the defendant had entered into a contract under which Hoe was to sell machinery to the defendant. All of the negotiations for the contract were done over the telephone or in Pennsylvania. The court held that New York courts did not have personal jurisdiction over the defendant because he did not have minimum contacts with the state of New York.

In *Misco Leasing, Inc. v. Vaughn*, 450 F.2d 257 (10th Cir. 1971), the defendant guaranteed payment under a lease between the plaintiff and a third party. The plaintiff was a resident of Kansas and the defendant and the third party were residents of Oklahoma. Under the lease contract, the third party/lessee was to make payments to the plaintiff/lessor in Kansas. The court held that the defendant had not established minimum contacts with Kansas and, therefore, was not subject to personal jurisdiction of the Kansas courts.

As these cases indicate, the holding of the Ohio Supreme Court in the present case does not follow the holdings of this Court or of the United States Circuit Courts of Appeal on this issue.

1. **A Georgia company does not transact business in Ohio within the meaning of the Ohio long-arm statute when the Georgia company enters into a contract with an Ohio resident to lease a space for retail sales in a Kentucky mall.**

The Ohio Supreme Court based its holding that the petitioner had established minimum contacts with Ohio on its belief that petitioner was transacting business in Ohio. *Kentucky Oaks Mall Co. v. Mitchell's Formal Wear, Inc.*, 53 Ohio St. 3d 73 (1990). Ohio Revised Code Annotated § 2307.382 (Anderson Supp. 1989) states that "[a] court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person's: (1) Transacting any business in this state. . . ." Applying that statute to the present case, the Ohio Supreme Court held that "a commercial nonresident lessee, for purposes of personal jurisdiction, is 'transacting any business' within the plain and common meaning of the phrase, where the lessee negotiates, and through the course of dealing becomes obligated, to make payments to its lessor in Ohio." *Kentucky Oaks Mall Co. v. Mitchell's Formal Wear, Inc.*, 53 Ohio St. 3d 73, 76 (1990). In reaching this conclusion, the Ohio Supreme Court has established the type of "mechanical" test which this Court expressly rejected in *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945) and *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478 (1985).

This mechanical test laid down by the Ohio Supreme Court fails to consider the fact that to a retailer, leasing a shop does not constitute "transacting business." Retailers are in the business of selling or renting goods to the public. When a retailer enters a contract to lease a shop in which to run his business, that contract is only an "intermediate step" on the way to the final goal of operating a retail store. To the retailer, operating the store, not entering into the lease agreement, constitutes "transacting business."

In the present case, the respondent may well consider entering a lease agreement "transacting business." However, the respondent is in the business of developing and leasing property. The fact

is, "transacting business" means different things to different people. To a resident of Paducah, Kentucky who is a mechanic or an accountant or a housewife, renting or buying a tuxedo or formal gown from the petitioner's store does not constitute "transacting business" even though the petitioner would definitely consider that "transacting business." The Ohio Supreme Court apparently ignored this fact when it held that the *petitioner* was "transacting business" in Ohio. The focus of the Ohio long-arm statute is whether the nonresident defendant is "transacting business" in Ohio, not whether the resident plaintiff is doing so. Ohio Rev. Code Ann. § 2307.382 (Anderson Supp. 1989). Yet the Ohio Supreme Court ignored the focus of the Ohio long-arm statute and focused instead on the plaintiff's business and the fact that the defendant was an out of state "customer" of the plaintiff.

2. To support its decision that "a lease agreement . . . is 'transacting business' within the forum state's long-arm statute," the Ohio Supreme Court relied on cases which involved a far greater amount of activity by the defendant with the forum state than the single contact that occurred in the present case.

The Ohio Supreme Court stated that "our finding is reinforced by the fact other courts have passed on this issue reaching the same result, to wit: that a lease agreement, in certain circumstances, is "transacting business" within the forum state's long-arm statute." *Kentucky Oaks Mall Co. v. Mitchell's Formal Wear, Inc.*, 53 Ohio St. 3d 73, 76 (1990). The Court then cited five cases in support of this proposition. *Id.* Each of these five cases is factually distinct from the present case.

In *Wright Int'l Express, Inc. v. Roger Dean Chevrolet, Inc.*, 689 F. Supp. 788 (S.D. Ohio 1988), the defendant, a Florida resident, leased an airplane from the plaintiff, a resident of Ohio. The plaintiff successfully obtained personal jurisdiction over the defendant in the Ohio courts. Like the present case, the defendant in *Wright* never went to Ohio and all negotiations were done over the telephone

or through the mail. However, in that case, the subject of the lease, the airplane, was based in Ohio during the entire term of the lease, the records for the jet were kept in Ohio, and all maintenance on the jet was done in Ohio. In the present case, the subject of the lease is a store which is located in Kentucky.

In *Vena v. Western General Agency, Inc.*, 543 F. Supp. 779 (N.D. Ill. 1982), the defendant, a resident of Arizona, leased an airplane from the plaintiff, an Illinois resident. The court allowed personal jurisdiction over the defendant in the Illinois courts. In *Vena*, the defendant sent an agent to Illinois to negotiate the lease contract and to solicit business for the defendant. The defendant also solicited investors in Illinois. Finally, the lease contract stated that it was governed by Illinois law, thus the defendant invoked the benefits and protection of Illinois law. The petitioner in the present case has never had an agent in Ohio nor solicited any business or investors in Ohio. Furthermore, the law of Ohio does not govern the lease in the present case.

In *Klippel v. Heintz*, 231 Kan. 312, 644 P.2d 428 (1982), a Missouri plaintiff assigned the majority interests in two oil and gas leases to the Illinois defendant. By virtue of this assignment, the defendant knowingly became the majority owner of the two leases which were located in Kansas. These leases created certain duties on the part of the defendant which he had to perform within Kansas. The plaintiff later sued the defendant in Kansas and the court held that the defendant had established minimum contacts with Kansas. By contrast, the petitioner in the present case owns no property in the forum state and the store which is the subject of the lease is located in Kentucky.

In *Schano Transp, Inc. v. Smith*, 312 N.W.2d 114 (Minn. 1981), the plaintiff, a Minnesota resident, leased a truck from the defendant, a resident of Iowa. The plaintiff later sued the defendant in Minnesota for breach of the lease agreement. The truck which the defendant leased to the plaintiff was licensed in Minnesota. The defendant also provided drivers for the plaintiff and these drivers drove in and through Minnesota for the plaintiff. The lease agree-

ment was governed by Minnesota law and the defendant had made business trips to Minnesota. In *Schano Transp.*, the court held that the defendant had established minimum contacts with Minnesota. In the present case, no representatives of the petitioner ever went to or through Ohio on any business matter.

In *S.D. Leasing, Inc. v. Al Spain and Associates*, 277 Ark. 178, 640 S.W.2d 451 (1982), the Arkansas plaintiff sued the Florida defendant for breach of a contract wherein the defendant leased a copying machine from the plaintiff. In *S.D. Leasing*, the defendant never went to Arkansas, the lease was negotiated over the telephone and through the mail, and the defendant mailed rent payments to the plaintiff in Arkansas. However, the lease stated that Arkansas law would govern and that the defendant agreed to subject himself to personal jurisdiction of the Arkansas courts. The petitioner in the present case has not consented to the jurisdiction of the Ohio courts nor do the laws of Ohio govern the dispute between the petitioner and respondent.

In each of the cases cited by the Ohio Supreme Court, the defendant purposely involved himself with the forum state by either obtaining a property interest in real or personal property within the forum state, or invoking the protection and benefits of the laws of the forum state or making personal visits to the forum state. The petitioner in the present case did none of these things. Yet these were the only cases the Ohio Supreme Court cited in support of its proposition that a single lease contract between a nonresident defendant and a resident plaintiff can give rise to personal jurisdiction over the defendant.

Because the Ohio Supreme Court failed to focus on whether the *petitioner* was "transacting business" in Ohio and rather focused on the respondent's business, and because the Court failed to find even one case which supports personal jurisdiction over a nonresident defendant with facts like the ones in the present case, the Ohio Court erred in finding that the Ohio long-arm statute affords personal jurisdiction over the petitioner in this case. However, regardless of whether the language of the Ohio long-arm statute applies

to the petitioner, the petitioner's contacts with Ohio were so insignificant that this Court should hold that petitioner did not establish the minimum contacts required by the due process clause of the fourteenth amendment.

B. When all of the relevant interests of the parties and states involved in this case are balanced, the Ohio Supreme Court's holding that the Petitioner is subject to personal jurisdiction of the Ohio courts violates traditional notions of fair play and substantial justice.

For the second part of the two-part test set out in *Burger King* this Court has listed five factors which it deems relevant in determining whether assertion of personal jurisdiction over a nonresident defendant comports with fair play and substantial justice. Those are " 'the burden on the defendant,' 'the forum State's interest in adjudicating the dispute,' 'the plaintiff's interest in obtaining convenient and effective relief,' 'the interstate judicial system's interest in obtaining the most efficient resolution of controversies,' and the 'shared interest of the several States in furthering fundamental substantive social policies.' " *Burger King* at 477 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)).

The Ohio Supreme Court mentions three of these factors in its discussion. First, it points to the fact that the petitioner operates one hundred and one stores throughout the Southeastern United States including Kentucky which borders Ohio. The Court then states that " 'considering today's modern means of transportation, it is not unreasonable for Mitchell's to defend itself in Ohio.' " 53 Ohio St. at 78. It is true that the burden on defendant in travelling from Georgia to Ohio is not much greater than travelling from Georgia to Kentucky. However, the store which is the subject of the lease as well as some of the petitioner's employees are located in Paducah, Kentucky, which is over three hundred miles from the Ohio border. These facts make it more of a burden on the petitioner to defend the suit in Ohio than in Kentucky.

The other factors mentioned by the Ohio Supreme Court are the interests of the respondent and the forum state. With regard to these interests the Court states that the "[respondent's] and the forum state's interest in adjudicating the dispute is strong." *Id.* The Court never elaborates on the respondent's "strong" interest, it simply states that respondent has a strong interest. According to this Court, the relevant interest of the respondent is its interest in "obtaining convenient and effective relief. . . ." *Burger King* at 477. However, since the respondent owns a mall in Kentucky, and since the dispute in this case concerns a lease of one of the stores in that mall, and since the laws of Kentucky govern that lease and the underlying dispute in this case, the state wherein the most convenient and effective relief can be had by any party would be Kentucky. Significantly, a case on the same issues raised by the respondent in the present case is currently pending in Kentucky.

With regard to the forum state's interest in adjudicating the dispute, the Ohio Supreme Court said that the Ohio long-arm statute was intended to provide a forum for Ohio residents. However, the respondent can easily obtain a forum for his dispute in Kentucky where he owns and runs his mall. The Ohio Supreme Court also stated that "Ohio has an interest in resolving suits brought by its residents and has a substantial interest in seeing that its residents get the benefit of their bargains." *Kentucky Oaks Mall Co. v. Mitchell's Formal Wear, Inc.*, 53 Ohio St. 3d 73, 76 (1990) (quoting *Wright Int'l Express, Inc. v. Roger Dean Chevrolet, Inc.*, 689 F. Supp. 788, 791 (S.D. Ohio 1988)). None of these interests will be better served by maintaining the lawsuit in Ohio rather than in Kentucky.

Furthermore, the interest of the interstate judicial system in obtaining the most efficient resolution of this controversy and the interests of the several states in furthering fundamental substantive social policies would both be better served if this dispute is resolved in the courts of Kentucky. The dispute involves the lease of a store in Kentucky, the law of Kentucky governs the dispute, and both parties have availed themselves of the privileges of conducting business in Kentucky.

Because the petitioner is not transacting business in Ohio and has not established minimum contacts with the state of Ohio, and because a balancing of relevant policy interests favors adjudicating this dispute in Kentucky, the Ohio Supreme Court violated petitioner's due process rights by subjecting it to the personal jurisdiction of the Ohio courts.

CONCLUSION

For the reasons stated herein, the Petition for a Writ of Certiorari should be granted and the decision of the Supreme Court of Ohio should be reversed.

Respectfully submitted,

Michael J. Altier
National Retail Federation
701 Pennsylvania Ave., N.W.
Suite 710
Washington, DC 20004
(202) 783-7971

Counsel for *Amicus Curiae*

December 7, 1990